BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

HARRY A. STEWART Claimant	)	
VS.	)	
LAFARGE CORPORATION Respondent	)	Docket No. 1,021,441
AND	)	
GALLAGHER BASSETT Insurance Carrier	)	

ORDER

Respondent requested review of the July 20, 2006 Award by Administrative Law Judge (ALJ) Thomas Klein. The Board heard oral argument on October 20, 2006 in Wichita, Kansas.

APPEARANCES

Jan L. Fisher, of Topeka, Kansas, appeared for the claimant. Larry D. Shoaf, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, at oral argument the parties agreed that the 5 percent functional impairment awarded by the ALJ was appropriate and not in dispute.

ISSUES

The ALJ found that the claimant had a 27 percent work disability based upon an 18 percent actual wage loss and a 36 percent task loss, over and above the 5 percent permanent partial functional impairment.[1]

[1] ALJ Award (July 20, 2006) at 3.

The respondent requests review of the issues of average weekly wage, specifically whether fringe benefits should be included in the wage loss calculation, as well as the nature and extent of claimant's disability. Respondent contends the post-injury average weekly wage should include the increasing value of the fringe benefits. If the value of fringe benefits are included within the claimant's pre and post-injury wages, claimant would have little or no wage loss and his recovery would be limited to his functional impairment or a very minimal period of work disability. Alternatively, if the Board rejects respondent's wage argument and concludes claimant has sustained a wage loss and resulting work disability under K.S.A. 44-510e(a), respondent contends claimant's task loss is limited to 24 percent as indicated by Dr. Stein (utilizing Dan Zumalt's task list) and the resulting work disability should be modified to reflect this figure.

Claimant argues that the task loss opinion expressed by Dr. Stein is faulty in that it fails to account for all of claimant's jobs in the 15 years before his injury. Thus, based upon Dr. Stuckmeyer's 44 percent task loss and claimant's actual wage loss, claimant urges the Board to modify the Award to reflect a 31 percent work disability up to May 1, 2005, at which time the work disability decreases to 29.5 percent.[2]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

There is no dispute as to the compensability of this claim. Rather, the only dispute surrounds the method of calculating claimant's post-injury average weekly wage and claimant's work disability under K.S.A. 44-510e(a).

Pre and Post Wage Calculation

Following his injury, the claimant was not able to return to his job with respondent as a maintenance electrician. As of August 23, 2004, he bid on another job within respondent's organization and began earning $736.76, exclusive of benefits. This wage resulted in an 18 percent wage loss when compared to his pre-injury wage, again exclusive of benefits. On May 1, 2005, claimant, along with all of respondent's employees, received a raise and his wages increased to $764.07, again exclusive of benefits. This raise lowered claimant's post-injury wage loss to 15 percent.

Respondent has entered into evidence various figures which, highly summarized, show that the cost of providing benefits to its employees has consistently increased since

[2] As of May 1, 2005, claimant received a pay raise. Accordingly, claimant concedes his resulting wage loss for purposes of the work disability computation decreased to 15 percent.

the date of claimant's accident on December 17, 2003. However, it is undisputed that respondent has never ceased paying fringe benefits to claimant. Respondent ardently contends that the failure to consider the rising cost of benefits effectively provides a windfall to claimant for which respondent receives no credit. Respondent argues this is unfair and the applicable statute, K.S.A. 44-511(a)(2) is outdated and should be interpreted in such a manner so as to include the rising value of fringe benefits when calculating pre and post-injury wages. Respondent goes on to suggest that the Board has "moved in this direction"[3] with its ruling in *Reed v. Central Sand Company, Inc.*[4]

The ALJ rejected respondent's argument as he concluded that K.S.A. 44-511(a)(2) contemplates the inclusion of fringe benefits in the wage calculation only when those payments are discontinued.[5] And because they were not discontinued, the fact that the cost to respondent increased was irrelevant. Thus, claimant's wage loss was found to be 18 percent.[6]

The Board has considered respondent's argument and while interesting, finds that it has no support in the law. It is clear that K.S.A. 44-511(a)(2) contemplates the inclusion of fringe benefits if and only if the fringe benefits are discontinued. There is no provision for considering the effects of inflation or an increase in costs to the employer. There is no dispute that claimant's benefits have never been discontinued although they have increased in cost. Accordingly, the Board affirms the ALJ's finding that claimant's wage loss does not include the value of fringe benefits. Claimant's wage loss is 18 percent as of August 23, 2004 and that portion of the ALJ's Award is affirmed. The Board must, however, modify the Award to reflect the decrease in claimant's wage loss as of May 1, 2005 to 15 percent.

Nature and Extent of Impairment

Two physicians have testified in this matter and provided opinions as to the nature and extent of claimant's permanent impairment and his task loss, as required by K.S.A. 44-510e(a). Dr. Stein, a board certified neurosurgeon, treated claimant beginning in January 2004. Following his first examination, he diagnosed lumbar degenerative disk disease and probable radiculopathy. He recommended epidurals and physical therapy. He ultimately assessed permanent restrictions as follows: occasionally lift 20 pounds, no lifting from below knee height, frequent lift up to 10 pounds and no repetitive bending or twisting of the

---

[3] Respondent's Brief at 4 (filed Oct. 6, 2006).

[4] *Reed v. Central Sand Company, Inc.*, No. 216,797, 1999 WL 195262 (Kan. WCAB Mar. 30, 1999).

[5] ALJ Award (July 20, 2005) at 2.

[6] The ALJ's Award fails to take into account the claimant's subsequent wage increase which claimant concedes lessened his wage loss to 15 percent as of May 1, 2005.

lower back. Based on these restrictions, claimant was medically disqualified from performing his job as an electrician as of August 23, 2004. Claimant was given the option of bidding on another position within the company and he was reassigned to a job as a truck driver, a position he continues to perform, although with some difficulty.

Based upon his restrictions, Dr. Stein further opined that claimant has lost the ability to perform 8 of 26 tasks as itemized by Dan Zumalt, a vocational expert.[7] This translates into a 31 percent task loss.

Claimant was also examined by Dr. James Stuckmeyer, an orthopaedic surgeon. Following his examination, Dr. Stuckmeyer imposed restrictions that were nearly identical to those imposed by Dr. Stein. Dr. Stuckmeyer also found that the claimant could no longer perform 11 out of 25 tasks for a task loss of 44 percent[8], based upon the task analysis prepared by Dick Santner.[9]

It is undisputed that claimant's injury does not fit within the schedules of K.S.A. 44-510d, and that his resulting permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall**

---

[7] It is worth noting that Mr. Zumalt did not include the job tasks associated with the job of millwright because he concluded that job fell outside the 15 year period of time during which the statute, K.S.A. 44-510e(a) considers relevant.

[8] The ALJ's Award indicates Dr. Stein assigned a 40 percent task loss. This is a mathmatical error.

[9] Unlike Mr. Zumwalt, Mr. Santner included the job tasks included within the millwright's job. And claimant testified that he reviewed this task list and found it to be accurate in terms of tasks, jobs and dates.

> **not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

In this instance, there is no dispute that claimant was unable to return to his pre-injury position as an electrician and that as a result, he was compelled to find another position within respondent's organization. However, his post-injury position has nonetheless resulted in a wage loss. That wage loss is not affected by the value of his fringe benefits, as indicated above. Thus, the ALJ's conclusion that claimant sustained an 18 percent wage loss is affirmed.

As of May 1, 2005, that wage loss decreased to 15 percent due to a company-wide 45-cent an hour raise. Accordingly, the ALJ's Award is modified to reflect the 15 percent wage loss as of May 1, 2005.

The ALJ averaged the task loss opinions expressed and concluded that they were equally persuasive. The Board agrees with the ALJ's rationale and finds that the two opinions, mathematically corrected, should be averaged. Thus, the Award is modified to reflect a 37.5 percent task loss.

When the 37.5 percent task loss is averaged with the 18 percent wage loss, the resulting work disability finding is 28 percent beginning August 23, 2004. Then, on May 2, 2005 the work disability is modified to 26 percent.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated July 20, 2006, is affirmed in part and modified in part as follows:

The claimant is entitled to 20.75 weeks of permanent partial disability compensation at the rate of $440.00 per week or $9,130.00 for a 5 percent functional disability followed by 36.00 weeks of permanent partial disability compensation at the rate of $440.00 per week or $15,840.00 for a 28 percent work disability followed by 51.15 weeks of permanent partial disability compensation at the rate of $440.00 per week or $22,506.00 for a 26 percent work disability, making a total award of $47,476.00.

As of November 13, 2006 there would be due and owing to the claimant 20.75 weeks of permanent partial disability compensation at the rate of $440.00 per week in the sum of $9,130.00 plus 36.00 weeks of permanent partial disability compensation at the rate of $440.00 per week in the sum of $15,840.00 plus 51.15 weeks of permanent partial disability compensation at the rate of $440.00 per week in the sum of $22,506.00 for a total

due and owing of $47,476.00, which is ordered paid in one lump sum less amounts previously paid.

All other findings and conclusions contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

IT IS SO ORDERED.

Dated this _____ day of November 2006.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Jan L. Fisher, Attorney for Claimant
Larry D. Shoaf, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge